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In the Supreme Court of the United States

October Term, 1990

RONALD CHISOM, et al.,
Petitioners,

v.

CHARLES E. ROEMER, et al.,
Respondents.

Consolidated with

UNITED STATES,
Petitioners,

v.

CHARLES E. ROEMER, et al.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE SUPREME COURT JUSTICE FOR ORLEANS, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Supreme Court Justice for Orleans, Inc., is a non-profit public interest corporation organized under the laws of the State of Louisiana and domiciled in Orleans Parish, Louisiana. The corporation's purpose is to engage in non-partisan activities to change the electoral laws of Louisiana in order to provide for a supreme court district comprised solely of Orleans Parish, a parish in which African-American voters are in the majority.

Supreme Court Justice for Orleans, Inc., has pursued its purpose through voter education activities, supporting state legislation designed to change the

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[1] All parties in both No. 90-757 and No. 90-1032 have consented to participation by amicus. Copies of their letters accompany this brief, pursuant to Rule 37.3 of the Rules of this Court.

method of electing state supreme court justices, and participating in amicus curiae briefs on behalf of parties litigant in voting rights cases who seek relief consistent with the purpose of the corporation. This case, therefore, involves a matter of direct organizational interest to amicus.

SUMMARY OF ARGUMENT

These consolidated cases are before this Court because the court of appeals (in another case) incorrectly read the term "representative" too narrowly and, thereby, concluded that judicial elections are not covered by § 2 of the Voting Rights Act. As a result, that court foreclosed the panel considering these cases from determining whether the election districts for the Louisiana Supreme Court violate § 2.

This amicus brief will address in detail the various rationales for reading the term "representative" more broadly. These rationales include the plain meaning (both common sense usage and technical meaning) of the term, application of maxims of statutory interpretation, and the historical development of the tradition of electing state judges as "representatives."

In addition, this brief attempts to place the instant cases in perspective by detailing Louisiana's history of official and unofficial discriminatory practices, and the appropriate remedy for the racial vote dilution shown in these cases.

ARGUMENT

I. JUDGES ARE "REPRESENTATIVES".

This case is before this Court because the Court of Appeals for the

Fifth Circuit, sitting en banc, overruled the two-year-old precedent of Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), holding that § 2 of the Voting Rights Act does not apply to judicial elections. See LULAC v. Clements, 914 F.2d 620 (5th Cir. 1990), cert. granted sub nom. Houston Law. Ass'n v. Attorney Gen., 59 U.S.L.W. 3500 (U.S. Jan. 18, 1991) (Nos. 90-813, 90-974). The LULAC majority summarized its conclusion about the coverage of § 2 as follows: "Congress was at great pains to phrase the new Section 2 in such language as to make clear that its results test applies to voting in elections of representatives only." LULAC, 914 F.2d at 622 (emphasis in original). That conclusion, which crafts a judicial exception to the otherwise

broad coverage of § 2, was premised upon the belief that the judiciary serves "no representative function" and "represents no one." Id. at 625. These broad statements ignore the ordinary and technical usage of the term "representative," as well as the structure and legislative history of the Voting Rights Act and its amendments. The court of appeals' statements also overlook the historical development of the tradition of state judicial elections in this country and disregard the close connections among judicial elections, representative government, and public accountability.

The LULAC majority below did not employ the correct methodology for interpreting § 2. Instead, the plain meaning of the statutory term

"representative" should have been determined

> on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated. . . .

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment)(emphasis added).

The court of appeals did neither. First, it did not read "representative" in accordance with its ordinary usage. That court bypassed the broad range of roles encompassed within the plain meaning of "representative," seizing instead upon the most cramped sense of the term. Second, the LULAC majority failed to read "representative" in a

manner compatible with the other provisions of the Act and its expansive 1982 Amendments. As a result, the LULAC majority crafted an exemption to the broad coverage of the Act for elected judges. Proper statutory interpretation demonstrates that that exemption was not enacted by Congress, but was, instead, developed only by the court of appeals itself.

A. Both the Ordinary Usage of "Representative," and the Technical Meaning of This Political Term Dictate a Broad Reading.

The term "representative" has a wide variety of meanings, which easily encompass the duties of an elected judge. The LULAC majority was, therefore, incorrect in its assumption that Congress intended to use that term to limit the coverage of § 2 to legislators and executives only.

1. Ordinary Usage as Reflected in Dictionary Definitions

Webster's Dictionary provides the following diverse meanings in its first set of definitions for "representative":

> **1** : serving to represent, portray, or typify: characterized by representation . . . **2** : standing for or in the place of another: acting for another or others: constituting the agent for another esp. through delegated authority **3** : of, based upon, or constituting a form of government in which the many are represented by persons chosen from among them usu[ally] by elections. . . .

WEBSTER'S THIRD NEW INTERNAT'L DICTIONARY 1926 (1986) (emphasis added).[2] All three of these meanings,

[2] Only in the second set of definitions is there a meaning even approaching the court of appeals' narrow reading: "one who represents a constituency as a member of a legislative or other governing body." WEBSTER'S, supra, at 1926 (emphasis added). Even this definition includes elected representatives in governmental bodies other than legislatures, e.g. courts.

and especially the third, easily include judges.

2. Technical and Professional Meanings

The term "representative" has been widely debated by political scientists. See generally H. PITKIN, THE CONCEPT OF REPRESENTATION (1972). For example, A. H. Birch identifies three technical usages of this term which parallel the common usages quoted above: "1. to denote an agent or spokesman who acts on behalf of his principal; 2. to indicate that a person shares some of the characteristics of a class of person; 3. to indicate that a person symbolizes the identity or qualities of a class of persons." A.H. BIRCH, REPRESENTATION 15

(1971).[3]

3. The Definition Employed by the Court of Appeals is Much Narrower Than the Common and Technical Usages.

The court of appeals described § 2 representatives very narrowly as those who "synthesize the opinions of their constituents and reflect them in the debate and deliberation of public issues." LULAC, 914 F.2d at 625. That court then contrasted this narrow definition with what it viewed as the judicial function of resolving disputes about the law, which might include ruling that a popular law is unconstitutional. Id. at 626.

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[3] Similarly, Black's Law Dictionary defines "representative" as a "person or thing that represents, or stands for, a number or class of persons or things, or that in some way corresponds to, stands for, replaces, or is equivalent to, another person or thing." See BLACK'S LAW DICTIONARY 1302 (6th edn. 1990).

The court of appeals' approach to representation is too narrow because it ignores the multifaceted understanding of the term "representative" within the professional community. Indeed, political scientists have warned against focusing upon only representatives who act "on behalf of a group." Such a narrow view overlooks the crucial fact that the

> representative's actions are also accepted by these individuals as authoritative. In fact Weber goes so far as to write that 'the primary fact underlying representation is that the action of certain members of a group, the "representatives," is binding on the others or is looked upon as legitimate so that its result must be accepted by them.'

Nordlinger, Representation, Stability, and Decisional Effectiveness, in REPRESENTATION (NOMOS X) 109-10 (J.R. Pennock & J. Chapman eds. 1968)

(emphasis in original). See also PITKIN, supra, at 4-5 (contrasting views of Hobbes and later political theorists regarding the extent of a representative's independence, and warning against reading "any one of them in isolation"); Pitkin, Commentary: Paradox of Representation, in Pennock & Chapman, supra, at 38 (describing the need for a "detailed dissection" of "a concept as complex as representation").

Even taking the court of appeals' specific example of one aspect of judicial activity, political scientists observe that all representatives must, at times, make decisions contrary to the public will. "[A] democratic government must be accorded a sufficiently wide scope of independent authority by the electorate so that when conditions and events demand it, decisions can be taken

without first having to consider public opinion, and perhaps even taking actions that are distinctly unpopular among the voters." Nordlinger, supra, at 110. See also BIRCH, supra, at 48 (representatives derive their legitimacy from elections, but "have no obligation to take instructions from their electors").[4] Thus, all representatives should, and do, have some independence from the voters.

Though elected judges may be somewhat further along the spectrum of

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[4] This view that even a legislative representative should have general independence from the voters can be traced to Edmund Burke's classic "Speech to the Electors of Bristol," in November 1774, where he observed "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion. . . . [G]overnment and legislation are matters of reason and judgment, and not of inclination. . . ." BURKE'S POLITICS 115 (R. Hoffman & P. Levack eds. 1967).

independence (in terms of response to immediate voter concerns) than legislators, both are elected representatives. That is, both are representatives within the common and technical usages of that term, because they are elected as the voters' choice of the type of individual the voters desire to have exercise power on their behalf -- legislative power in the one case and adjudicative power in the other. That, after all, is the focus of the Voting Rights Act -- the voter's rights, not the duties performed by the person for whom they vote. Cf. Board of Estimate v. Morris, 489 U.S. 688, 698 (1989).

Moreover, judges do inherently "represent" (in the sense of "typify") persons with similar backgrounds. See generally Comment, A Judicial Exception

for Judicial Elections: "A Burning Scar On the Flesh of the Voting Rights Act," 65 Tul. L. Rev. part III.D (forthcoming 1991). In particular, judges bring their own character and background to the bench which, in turn, influence their interpretation of the law. Id. As Justice Holmes aptly noted:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

O.W. HOLMES, THE COMMON LAW 1 (1881). See also B. CARDOZO, THE NATURE OF THE

JUDICIAL PROCESS 12-13 (1921).[5]

B. This Court Should Read the Terms Contained in the Voting Rights Act Broadly in Light of the Other Provisions, Legislative History, and Broad Purposes of the Act.

Instead of excising a single word from one subsection of the Voting Rights Act, and then choosing the most restrictive definition, as the LULAC majority did, this Court should examine the term "representative" within the overall context of the Act. That examination will demonstrate that "representative" does not appear where one would expect the Act's coverage to be defined or limited, such as a definitional section. Rather, Congress

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[5] See also Harper, Integrate the Federal Bench, N.Y. Times, Feb. 22, 1991, at A17, col. 3 (nat'l ed.) (Pres. of Ass'n of the Bar of the City of N. Y. arguing that the federal "bench should reflect the diversity of our population").

utilized it in § 2(b) as an illustration of proof of a violation of § 2(a). See Thornburg v. Gingles, 478 U.S. 30, 43 (1986). Thus, to say that § 2(b) limits the coverage of § 2(a) is to say that a single example of a violation controls the entire section. This Court has held to the contrary. Gingles, 478 U.S. at 45 n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution.").

In particular, the election of a judge, for purposes of the Act, is no different from the election of any other public official. Thus, this Court should look to the true coverage section of the Act, § 14(c)(1), to see that elected judges are "candidates for public or party office," and, therefore, encompassed within the express terms of § 2 of the Voting Rights Act. LULAC,

914 F.2d at 654 (Johnson, J., dissenting).

A reading of § 2 which includes judges is consistent with the established interpretation that § 5 of the Act covers judicial elections. See Georgia State Bd. of Elections v. Brooks, No. Civ. A. CV288-146 (S.D. Ga. Dec. 1, 1989, aff'd, 111 S.Ct. 288 (1990).

The Voting Rights Act of 1965 and its amendments were designed to "rid the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966). Courts should broadly construe such a remedial statute, especially one with the expansive structure and purpose of the Voting Rights Act. See Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969) ("the broadest possible scope").

Moreover, "[a]ny exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). The court of appeals' strained reading of the statute falls far short of these standards for statutory interpretation, and, thereby, frustrates the will of Congress evidenced by the structure and context of the Voting Rights Act.

Furthermore, the legislative history and background to the original Voting Rights Act of 1965 and its amendments support this broader reading of the term within this remedial act. See LULAC, 914 F.2d at 653-54 (Johnson, J., dissenting). That legislative history is detailed in Brief for

Petitioners Chisom, et al., at parts I, II.[6]

C. Principles of Federalism Also Support a Broad Reading of the Act.

Instead of taking account of this statutory context, purpose, and legislative history and background, the court of appeals inappropriately questioned the very practice of judicial elections, opining: "These offices are not 'representative' ones, and their occupants are not representatives," and adding "the state processes for filling them need not even be elective." LULAC, 914 F.2d at 631. But some states have,

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[6] One of the most telling portions of that history is Senator Orrin Hatch's statement that § 2 would cover elections in "all governmental units, including . . . judicial districts." S. Rep. No. 417, 97th Cong., 2d Sess. 151, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 323 ["Senate Report"].

in fact, chosen to elect their judges by a popular vote.

Therefore, the question before this Court is not whether the popular election of judges is desirable, as our system of federalism permits states to make that decision. Instead, the issue is whether Congress viewed this practice as similar to the election of other public offices and thus deserving of Voting Rights Act protection. See Comment, supra, at part III.D. Indeed, in Louisiana and many other states, voters elect a variety of quasi-judicial officers -- district attorneys, clerks of court, sheriffs, coroners. See generally Imbler v. Pachtman, 424 U.S. 409, 430 (1976). All these quasi-judicial officials are covered by §2, even though all of them, like judges, must be both representative and

impartial. Hence, the court of appeals is simply incorrect in its belief that "judicial offices and judicial selection processes are sui generis in our nation's political system." LULAC, 914 F.2d at 631. See also Brief for Petitioners Chisom, et al., at part IV. (discussing "representativeness" of judges and jurors).

As Chief Justice Burger observed:

> States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters . . . . However, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

Kramer v. Union Free School Dist., 395 U.S. 621, 629 (1969), quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663,

665 (1966). Cf. Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 229-30, 231 (1964) (public school system need not be established, but once it is, it must be administered in a non-discriminatory manner).

Similarly, "when a state decides that its trial judges are to be popularly elected, as Florida has done, it must recognize the candidates' right to make campaign speeches and the concomitant right of the public to be informed about judicial candidates." ACLU v. The Florida Bar, 744 F.Supp. 1094, 1097 (N.D. Fla. 1990). Based on this reasoning, that court enjoined enforcement of Fla. Jud. Canon of Conduct 7(B)(1), which proscribed discussion by judicial candidates of disputed legal or political issues. The court, thereby, recognized the

similarity between judicial campaigns and campaigns for other elective offices. See generally Hall, Constituent Influence in State Supreme Courts, 49 J. Pol. 1117 (1987).

In sum, by denying judicial elections the protection Congress intended under § 2 of the Voting Rights Act, the LULAC majority turned a deaf ear to the ordinary and the technical usages of the term "representative," the broad remedial purposes of the Voting Rights Act, and the legislative history of the Act. The majority also ignored the critically important American tradition of electing state judges as representatives of the people.

D. America's History of Elected State Judges Shows That They are Considered Representatives of the People.

In concluding that elected state judges could not be viewed as representatives, the LULAC majority closed its eyes to the historical reasons for instituting state judicial elections in the first place -- to ensure representative government and accountability to the people. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 126-27 (2d ed. 1985); E. HAYNES, THE SELECTION AND TENURE OF JUDGES 184 (1944); Dubois, Accountability, Independence, and the Selection of State Judges, 40 Sw.L.J. 31, 34-35 (1986); Champagne, The Selection and Retention of Judges in Texas, 40 Sw.L.J. 53, 111 (1986); Hall, The "Route to Hell" Retraced: The Impact of Popular Election

on the Southern Appellate Judiciary, 1832-1920, in THE AMBIVALENT LEGACY 229, 237-38 (D. Bodenhamer & J. Ely eds. 1984).

1. The Tradition of State Judicial Elections in America

The practice of electing judges developed in the United States as part of the broad-based Jacksonian democracy movement that swept the United States during the mid-nineteenth century, but this movement had even deeper roots. The Jacksonian push for more representative government on all levels and all offices (including judges) was actually "one phase of the general swing toward broadened suffrage and broader popular control of public office which Jacksonian Democracy built on the foundations laid by Jefferson." J.W.

HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 140 (1950).

As many scholars have observed, the general population was disenchanted with the unrepresentative character of the new government after the American Revolution. As a leading Southern historian recounts: "Much criticism arose because the people had not been given more voice in [the] adoption and promulgation" of state constitutions adopted in 1776. F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, at 101 (1971).

The economic "transformation" of the country after the Constitutional Convention of 1789 led to calls for a more representative system of government, including "the extension of suffrage, the establishment of public

schools, the equitable apportionment of representation, internal improvements, the use of public credit, an elective judiciary, the limitation of the powers of the legislature, the regulation of corporations, and others of similar nature." GREEN, supra, at 161-62 (emphasis added). See also Nye, The Young Republic, in L. WRIGHT, et al., THE DEMOCRATIC EXPERIENCE 85 (1963). That is, reforms and expansion of the suffrage were closely linked to the trend toward election of the state judiciary. Even Thomas Jefferson criticized the nature of suffrage and representation in the Virginia constitution, and suggested numerous amendments including "(4) Judges elected or amovable. (5) Justices, jurors, and sheriffs elective." GREEN, supra, at

175, quoting NILES' REGISTER 179 (Letter of Apr. 19, 1824).

Throughout the South during this period, the judiciary was attacked as too aristocratic, monarchical, and beyond popular control. In a House speech, W.B. Giles of Virginia condemned the judiciary as a "scion" of the executive set apart for convenience only. In North Carolina, there were calls to make the courts more responsive to the people through elections and shorter terms. Georgia reformers in 1819 advocated the creation of a popularly elected Georgia Supreme Court. See GREEN, supra, at 189-90.

Even judges began to view themselves as lawmakers. Professor Horwitz attributes this attitude to the perception by jurists that the common law was an instrument of will. He adds

that the behavior of judges reflected the view "that they had been given a popular charter to mold legal doctrine according to broad conceptions of public policy." M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 22-23 (1977). He quotes two prominent jurists of the period: "'Theoretical[ly] courts make no law', they declared, 'but in point of fact they are legislators'." Id.

In his first inaugural address to Congress in December 1829, President Jackson called for an expansion of representativeness in public offices:

> The duties of all public offices are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance. . . . In a country where offices are created solely for the benefit of the people no one man has

> any more intrinsic right to official station than another.

Quoted in R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 50 (1970) (emphasis added). This Jacksonian theme of offices becoming more open to a wider range of persons overlaps the dictionary definitional focus upon a representative as "typical" of a class of persons. See Part I.A.1., above. See also Pitkin, supra, at 38-39.

The call for greater openness in representation permeated all levels of public office and led to major changes in the state constitutions. The general population, long disenchanted with concentrations of power, demanded more control over and accountability from all of their public officials, including

judges.[7]

Making courts more accessible to the public was rooted in the "existing chaos of statutes and common law," which were believed to generate unaccountable "discretionary" power in the courts, thereby creating in effect a "legal and judicial aristocracy." A. SCHLESINGER, THE AGE OF JACKSON 329-30 (1945). See also GREEN, supra, at 189; Robinson, A Program for Labor, in SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 320 (J. Blau ed. 1947). A "factor of some consequence in

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[7] As the Albany Patriot newspaper explained:

> The people will demand that the next legislature shall either pass a law resigning the election of judges into the hands of the people from whom they have in part usurped the authority, or, that they shall provide for submitting it to them to be decided at the ballot box.

GREEN, supra at 260, quoting The New Constitution 63 (1849).

the movement to bring the judges under popular control, seems to have been the idea that American judges, much more than judges generally, were invested with legislative functions." HAYNES, supra, at 95.

This increasing pressure for change led many states to switch from appointment to popular election of judges. Georgia elected the first lower court judges in 1812, while Mississippi, in 1832, was the first state to adopt a completely elective judiciary. New York, in its 1846 Constitutional Convention, switched from legislative and gubernatorial appointment to election. In 1850, seven states adopted laws that provided for more popular election of judges. See FRIEDMAN, supra, at 371.

As might be expected in a federal system, some states have gone back and forth, experimenting with appointive, elective, and mixed schemes. For example, during Reconstruction, some Southern states briefly returned to the appointive system. FRIEDMAN, supra, at 371. See also Champagne, supra, at 55 (In Texas, judges were gubernatorial appointees until Jacksonian influences led to judicial elections in 1850; gubernatorial appointment was reinstated briefly during Reconstruction; the state returned to elections in 1876.).

2. The History of Judicial Elections in Louisiana.

Louisiana was no exception to the nineteenth century movement toward judicial elections. One delegate to the 1844 Louisiana Constitutional Convention

epitomized this desire to achieve public accountability by the courts: "[M]y colleagues and myself have been instructed by a voice that will admit of no excuse, to enter the great judicial tabernacle and make it accessible to the people. They want to know their priest -- they want a voice in his promotion." Proceedings and Debates of the Convention of Louisiana, Jan. 14, 1845, at 741. He carefully described the goal of treating elected judges as public representatives in a manner that refutes the ahistorical approach taken by the LULAC majority:

> But the necessity of electing judges becomes absolutely imperative, in our minds, when we approach the consideration of the functions they fulfill. Judges not only decide controversies between individuals, but they interpret and construe the constitution and laws. The same constitution, when looked

> upon by a democratic and an aristocratic eye presents very different appearances.

Id. at 743 (emphasis added). He added: "That such a power as this should be placed beyond the controlling influence of public opinion . . . and public virtue, is clearly incompatible with free government." Id.

By 1852, when the next Louisiana Constitutional Convention adjourned, there was substantial support for making the judiciary more representative of the people through elections. Indeed, the principal criticism of the proposals was that the terms for the elected judges were too long for them to be "accountable" to the people:

> One thing it proposed was to elect the Chief Justice for ten years! . . . It was in effect, a judiciary of life tenure . . . . The fact was, that the majority of the Convention intended by this provision, to destroy the

> principle of an elective judiciary, for the object of the system was to hold the Bench accountable to the people. . . .

New Orleans Daily True Delta, Oct. 27, 1852, at 2 (Speech of Col. Flucker) (emphasis added).

In 1920, the Louisiana Bar Association appointed a special committee to make recommendations on the "Judiciary" article for the Constitutional Convention of 1921. The committee's report described an elective system as making judges "directly and immediately responsible to the people, and subject to popular approval and reproof." Report of the Special Committee on Judiciary Ordinances of the New Constitution (Feb. 1920), reprinted in 1 LA. STATE LAW INST., PROJET OF A CONSTITUTION FOR THE STATE OF LOUISIANA

WITH NOTES AND STUDIES 1035, 1042 (1954) ["PROJET"]. [introduced as Government Ex. 27 at trial in case No. 90-1032]

Indeed, the Report recommended that new judicial election districts be added by the 1921 Constitution, and it announced in clear terms: "Each justice and judge now in office shall be considered a representative of the judicial district within which is situated the parish of his residence at the time of his election." PROJET, supra, at 1039 (emphasis added).

3. Judicial Accountability and Judicial Independence

In describing the differences between the federal appointive model and the general state elective model, Philip Dubois, oft-cited historian of the judicial election process, observes: "[T]here has been great disagreement on

how best to accommodate these conflicting values of judicial independence and judicial accountability in the selection and retention of judges." Dubois, supra, at 34.

He explains that some commentators "would place the emphasis upon accountability, with judges initially selected by popular election and subject to popular review after relatively short terms in office." Id. at 35. On the other hand, opponents of judicial elections, like the LULAC majority, have expressed concern that public accountability was achieved at the cost of judicial independence. See generally Comment, supra, at part III.C n.134 (collecting sources in the debate). Lawrence Friedman offers a balanced assessment:

> In the long run, the elective system did not have results so earthshaking, for good or bad, as proponents had hoped and opponents had feared . . . . Some lawyers had warned of the grave danger to the polity that might come from making judges run for offices; hostile politicians would grub about in the reports, find an unpopular decision, and use it politically to ruin a sitting judge. But as it turned out, most sitting judges who ran again won again, regardless of party.

FRIEDMAN, supra, at 371-72. See also Champagne, supra, at 111. Indeed, even an author who disapproves of judicial elections acknowledges that they are

> still in use in a majority of states and tenaciously clung to by many people. Their demand for elected judges, like their demand for jury trial, is a manifestation of a deep-rooted determination among free people to keep in their own hands control over the process whereby their lives, liberties, and properties are disposed.

Winters, Judicial Selection and Tenure, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 27, 32 (G. Winters ed. 1967).

As this historical discussion reflects, several states, including Louisiana, have opted for political accountability by their elected judicial representatives. Therefore, the LULAC majority should not have questioned the wisdom of those decisions. Instead, it should have enforced Congress' clearly expressed intention to subject those elections to the fairness requirements of § 2 of the Voting Rights Act.

II. LOUISIANA'S HISTORY OF OFFICIAL DISCRIMINATION ENGENDERED EFFECTS WHICH CONTINUE TODAY.

Both historians and courts have documented Louisiana's long, sad history of racial discrimination and political disenfranchisement. The panel in Chisom

did not have the opportunity to render judgment on the three Gingles factors or the Senate factors in this § 2 case, because the en banc court, in LULAC, ruled that judicial elections are not covered. A brief look at Louisiana's history, however, places the matter in perspective.

A. History Behind Louisiana's 1898 Constitution

Louisiana's current districts for electing state supreme court justices have direct historical antecedents in the Louisiana Constitution of 1898, regarded by historians and by this Court as a tool for the disenfranchisement of African Americans. See, e.g., Louisiana v. United States, 380 U.S. 145, 147 (1965) ("[B]eginning with [that Constitution, Louisiana] put into effect a successful policy of denying Negro

citizens the right to vote because of their race."); W.J. HAIR, BOURBONISM & AGRARIAN PROTEST: LOUISIANA POLITICS, 1877-1900, at 276 (1969); Plaintiffs' Exhibit ["Pl. Ex."] 3, at 2-3 (Dr. Cassimere's Rpt.). See also Citizens for a Better Gretna v. City of Gretna, 636 F.Supp. 1113, 1117 (E.D. La. 1986), aff'd, 834 F.2d 496 (5th Cir. 1987), cert. denied, 109 S.Ct. 3213 (1989).

The 1898 Constitution was part of the general movement to eviscerate the effects of the post-Civil War Amendments. Like other constitutions and statutes passed in the South during the 1890s, it contained provisions to disenfranchise African Americans. See generally Hunter v. Underwood, 471 U.S. 222, 229 (1985).

The 1898 Constitution contained a

provision known as the "grandfather clause," which imposed burdensome requirements for voter registration, but exempted those persons who had been entitled to vote before January 1, 1867. This clause, declared unconstitutional in Guinn v. United States, 238 U.S. 347 (1915), was later called "a transparent expedient for disfranchising Negroes, whose ancestors had . . . not [been] entitled to vote in Louisiana before 1867." Louisiana, 380 U.S. at 148. See generally Pl. Ex. 3, at 2. These ingenious devices were especially effective in denying African-American suffrage. J.G. TAYLOR, LOUISIANA RECONSTRUCTED 1863-1879, at 483-84

(1974).[8] See also Stipulations ["Stip."] Nos. 36, 38 (detailing a decline in registered African Americans from 126,846 in 1896 to only 5,320 in 1900).

Encouraged by this Court's ruling in Guinn, African Americans petitioned the 1921 Constitutional Convention to expand the franchise. The delegates' reaction to this "delicate question" was to move all discussion of suffrage into executive session as they preferred "'not to debate it in the open'." A former Governor proposed, in lieu of the grandfather clause, that the suffrage

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[8] Even moderate policies of appointing African Americans to office was often mere window dressing. As Gov. Francis T. Nicholls of Louisiana said "'[I] appointed a number of [African Americans] to small offices sandwiching them on Boards between white men where . . . they were powerless to do harm'." HAIR, supra, at 22.

should be limited to the descendants of those persons who inhabited the earth north of the twentieth degree of north latitude prior to October 12, 1492, when Columbus discovered America. PROJET, supra, at 485 & n.119.

The outcome of the closed session was an "interpretation" test. It required a registration applicant to "'give a reasonable interpretation' of any section of the the state or federal constitution as a prerequisite to voter registration." Stip. No. 40. See La. Const. (1921) art. VIII, § 5(7).

Louisiana also enacted the so-called "white primary" which denied African Americans the right to participate in Democratic Party primaries. Pl. Ex. 3, at 2; Stip. No. 39. Because of the "solid" South's exclusive commitment to that Party, this

racially exclusive primary effectively prevented African Americans from having any meaningful participation in the electoral process. See generally Hackney, A Giant Step Backward: The Negro and Disenfranchisement, in 2 THE GROWTH OF AMERICAN POLITICS 213-14, 223-25 (F. Gatell, et al., eds. 1972). Such provisions were declared unconstitutional by this Court in Smith v. Allwright, 321 U.S. 649 (1944). After invalidation of the white primary, Louisiana instituted "citizenship" tests and an anti-single-shot provision, and the Democratic Party adopted a majority vote requirement. Stip. No. 42. The State also made greater use of the interpretation test provision described above, until it too was invalidated in 1965 in Louisiana, 380 U.S. at 152-53.

See generally Gretna, 636 F.Supp. at 1117.

The same 1898 Constitution that initiated these repeated attempts at disenfranchisement also instituted the peculiar system by which Justices to the Louisiana Supreme Court are still elected. Compare La. Const. (1879), art. 83 with La. Const. (1898), art. 87. The 1879 Constitution had set forth a five-member Court, with the Chief Justice elected from the state on an at-large basis, and the remaining four Justices elected from four judicial districts. By contrast, the 1898 Constitution provided for the election of one Justice from each of three judicial districts and the election of two Justices from the district which encompasses New Orleans and its suburban parishes (the most populous section of

the state). This same basic arrangement is still employed for the election of the Louisiana Supreme Court today. See La. Rev. Stat. Ann. § 13:101 (West 1983); Part III, below.

Recently, in Gretna, the district court rendered detailed findings of racial discrimination in and around the City of Gretna, a suburb of the New Orleans and the parish seat of one of the white-majority parishes (Jefferson) included in the Louisiana Supreme Court district challenged here. The district court described the history of discrimination and its continuing effects in Louisiana and Jefferson Parish. 636 F.Supp. at 1116. See also Gretna, 834 F.2d at 499. The court recounted the testimony of witnesses, detailing the "grinding details of everyday life" for African Americans.

636 F.Supp. at 1117 n.8. These findings of fact, coupled with the findings about history and stipulations in the instant cases are probative in determining whether the electoral system challenged in this case would exist but for the racial animus behind the 1898 Constitution. They are also important in considering the implications of continuing that system under current demographic and social conditions. See generally Hunter v. Underwood, 471 U.S. 220 (1985). In Hunter, this Court invalidated an Alabama constitutional provision that denied the right to vote to anyone convicted of crimes of "moral turpitude." This Court carefully reviewed the fact that the provision was first enacted as part of the 1901 Alabama Constitution which, like Louisiana's 1898 Constitution, was

adopted for the primary purpose of disenfranchising African Americans. This Court then analyzed the discriminatory impact of the provision in light of subsequent developments and the state's inadequate justification for continuing the provision. Id.

B. Continuing Effects of Past Discrimination

The discriminatory conditions described by historians, this Court, and numerous lower courts were all part of a conscious attempt, beginning with the 1898 Constitution, to deny Louisiana's African Americans their right to vote. This policy has had effects lasting until today.

The actual result of this history of racial discrimination is the severe depression of income levels, education, and employment for Louisiana's African

Americans; to this day, this depression impedes their effective participation in the political process. Gretna, 636 F.Supp. at 1120. Stipulations Nos. 101 through 109 attest to the same substantial economic disparity. Plaintiff's expert, Dr. Richard Engstrom, reported the vast socio-economic disparity between whites and African Americans which exists today. Pl. Ex. 1 and 3.

Judge Revius D. Ortique, Jr.'s testimony was particularly revealing. Judge Ortique testified that he, an African-American Orleans Parish Civil District Court judge, was compelled to arrange special sheriff's protection for himself and his staff when his court held a special session in neighboring, majority white Plaquemines Parish. Transcript [Tr.] 25. Judge Ortique's

testimony also noted that the most successful manner in which African Americans had reached the Orleans Parish bench (through appointment to a vacant position and candidacy as an incumbent) had been removed by the 1974 Constitution. Tr. 32.

Other witnesses also testified to the lingering effects of Louisiana's discriminatory history. Plaintiff's historical expert, Professor Raphael Cassimere, recounted some of the history detailed in part II.A., above, and then testified of official acts of racial discrimination which still occur in Louisiana. For example, Louisiana's 1984 Presidential primary was cancelled after Jesse Jackson announced his candidacy. Only through Justice Department intervention was the primary held, see Pl. Ex. 3; Jackson won the

Louisiana primary. Also, the State Department of Transportation settled with the Justice Department a case with evidence of the State's failure to promote African-American civil service workers. Tr. 130.

Indeed, the federal court dockets have been filled with other voting rights litigation from the very parishes which make up the Louisiana Supreme Court's First District. See, e.g., Citizens for a Better Gretna v. City of Gretna, 636 F.Supp. 1113 (E.D. La. 1986), aff'd, 834 F.2d 496 (5th Cir. 1987) (City's at-large electoral system violates § 2), cert. denied, 109 S.Ct. 3213 (1989); Major v. Treen, 574 F.Supp. 325 (E.D. La. 1983) (Congressional districts in greater New Orleans area violate § 2); East Jefferson Coalition for Leadership and Development v. Parish

of Jefferson, 691 F.Supp. 991 (E.D. La. 1988) (Parish Council election system violates § 2), appeals docketed, Nos. 89-3486, 90-3456 (5th Cir. 1990); Fifth Ward Precinct 1A Coalition and Progressive Ass'n v. Jefferson Parish School Board, 1989 WL 3801, No. 86-2963 (E.D. La. 1989) (settlement of § 2 case resulting in first elected African-American member of Parish school board).

Additionally, governmental entities in the area are subject to the preclearance provisions of the Voting Rights Act of 1965. 30 Fed. Reg. 9897 (1965); Stip. No. 43. Twelve Louisiana parishes, including Plaquemines, also have been designated for the appointment of federal examiners under the Voting Rights Act. See Stip. Nos. 44, 45.

At trial, numerous witnesses testified that for African Americans to

achieve electoral success, they would have to hide their race from potential white voters. Tr. 64-66, 70, 94. As a result, fund-raising for these African-American candidates was limited primarily to minority communities, which tend to be economically disadvantaged. Tr. 106. Other witnesses testified that money, and the name recognition it creates, are the keys to electoral success for judicial candidates. Tr. 116, Pl. Ex. 4. See also Tr. 25 (diatrict court judge testifying he would be "intimidated" campaigning in Plaquemines or St. Bernard Parishes).

When taken in its entirety, the history of racial discrimination in Louisiana has resulted in extreme economic disadvantages for African Americans. These disadvantages, occurring in conjunction with an

electoral system with dilutive features, have resulted in a remarkable lack of electoral success for African Americans. No African American has ever been elected to the Louisiana Supreme Court, and there are no elected African-American judges in the majority-white parishes of the First District. There have, however, been several successful candidacies in Orleans Parish, which has an African-American majority. See Stip. No. 52; Pets.' Supp. App., Table 1.

C. The Need for Remedial Action

The Statement of the Case and Part V of the Brief of Petitioners Chisom, et al., details their proof of the three Gingles factors and various Senate factors. In particular, the evidence in this case reviewed here demonstrates two of the Senate factors, namely discriminatory history and continuing

effects. Senate Report 28-29. Indeed, the evidence regarding these factors is so extreme that it raises the specter of discriminatory purpose for the current electoral system, one born out of the notorious 1898 Constitution and maintained despite its clear dilutive effects.

III. THE CREATION OF TWO SINGLE-MEMBER DISTRICTS IN PLACE OF THE EXISTING MULTIMEMBER DISTRICT IS THE MOST EFFICIENT AND EFFECTIVE REMEDY IN THIS CASE

The Louisiana Supreme Court's First District provides a stark example of the potential for minority vote dilution when judicial elections are not held to the standards of § 2. Currently, a sizeable African-American population is submerged in the First District, the only multimember district in the state.[9]

[9] The First District is composed of the parishes of Orleans, Jefferson, St. Bernard, and Plaquemines.

Rather than separating this district into two single-member districts, the State has perpetuated a system which effectively eliminates the potential for African-American voters to elect a Louisiana Supreme Court justice of their choice.

A. Redistricting Is the Appropriate Remedy.

The Louisiana Supreme Court is composed of seven justices, five of whom are elected from single-member districts. The justices are elected to ten-year terms, and the two justices from the First District are not elected in the same year -- a mechanism that defeats the possibility for "single-shot

voting."[10] Additionally, Louisiana has imposed a majority vote requirement for judicial elections, see Stip. No. 50, which Congress has recognized as a factor to consider in minority vote dilution litigation. See Senate Report 28-29.

The discrepancy between the First District and the other five districts could easily be remedied by dividing the First District into two single-member districts, one with boundaries coterminous with Orleans Parish and the other composed of the three remaining

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[10] Single shot voting allows voters to increase their relative support for their preferred candidate, by withholding support from non-preferred candidates. Under such a system, a ballot is not invalidated if the voter declines to vote for some positions.

parishes.[11] This traditional redistricting remedy would provide the sizeable African-American community of Orleans Parish with the opportunity to elect a candidate of its choice. Orleans Parish has historic and traditional boundaries, which have long been used as the election district for a wide range of offices, e.g. mayor, councilmembers at large, clerk of court, district attorney, civil and criminal sheriffs.

At trial, the State argued that splitting the First District into two single-member districts would create an inordinately small district (even though

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[11] The population of the remedial Orleans Parish district would be over 61 percent African-American, with an African-American voting age population of 56.31 percent. 1990 Census, Pub. L. No. 94-171, Redistricting Counts (reproduced in Appendix 1).

it would contain approximately half-a-million persons). This "concern" is illusory, however, because the population deviations among the current Supreme Court districts demonstrates that Louisiana has neither articulated nor pursued an interest in providing equal weight to each vote in judicial elections.[12] Nor is Louisiana required to follow the principle of one-person, one-vote. See Wells v. Edwards, 347 F.Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095 (1973).

The existing districting scheme results in a population deviation among

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[12] According to the district court, the districts deviated from the ideal population size by the following percentages: First District, -8.3%; Second District, -3.1%; Third District, +15.3%; Fourth District, -31.6%; Fifth District, +43.3%; Sixth District, -7.4%. Chisom v. Roemer, No. 86-4057 (E.D. La. Sep. 13, 1989), reprinted in Pet. for Cert. App. at 12a.

the districts of 74.95 percent, using the 1980 census data, and of 87.47 percent, using the 1990 census data. See Appendix 2. These deviations would not be increased by the remedy sought by Petitioners Chisom, et al., and urged by Amicus, because the two districts produced by splitting the First District in this manner would be neither the largest nor the smallest of Louisiana's Supreme Court election districts.

B. Redistricting is Now Easier and More Effective

Throughout most of the history of Louisiana's election of judicial officers, the districting plan for the election of the Supreme Court has been based in the Constitution. La Const. (1854), art. 64. In the 1974 Constitution, however, the districting plan for the Supreme Court was shifted

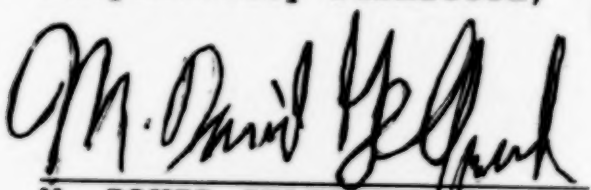
to a statutory basis. La. Const. art. V, § 4. In 1975, the Legislature established the current districts. See La. Rev. Stat. Ann. § 13:101 (West 1983). This new statutory basis for Supreme Court districting allows for a more expeditious redistricting of the judicial districts as a remedy in this case. On remand, therefore, the court below should invite the Louisiana Legislature to redraw the First District in light of the 1990 census data. Those data reflect a clear African-American majority in voting age population in Orleans Parish. See Appendix 1.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and remanded for invalidation and

remediation of the election system.

Respectfully submitted,



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Mar. 1991.

APPENDIX 1

	Total Population* (%)	Black Population (% of Total Population)	Total VAP (%)	Black VAP (% of Total VAP)
District 1	1,037,450 (100.00)	395,825 (38.15)	754,394 (100.00)	257,608 (34.15)
Orleans	496,938 (100.00)	307,728 (61.92)	360,476 (100.00)	202,995 (56.31)
Remaining Parishes**	540,512 (100.00)	88,097 (16.30)	393,918 (100.00)	54,613 (13.86)

* Population figures based on 1990 census.
** Jefferson, St. Bernard, and Plaquemines

APPENDIX 2

	Total Population*	% Deviation From Ideal District
District 1	1,037,450	-13.95
District 2	582,012	-3.46
District 3	701,584	+16.38
District 4	392,018	-34.97
District 5	919,372	+52.50
District 6	587,537	-2.54

* Population figures based on 1990 census.